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IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-220 and 72-359

PHELPS DODGE CORPORATION,

Petitioner,

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE CORPORATION, *et al.* and NATIONAL LABOR RELATIONS BOARD,

Respondents.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, *et al.*, and PHELPS DODGE CORPORATION,

Respondents.

BRIEF OF KENNECOTT COPPER CORPORATION, *AMICUS CURIAE,* IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

Kennecott Copper Corporation ("Kennecott") files this brief as *amicus curiae* in support of Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (Nos. 72-220 and 72-359) to review the judgment of that Court entered on May 9, 1972 in *AFL-CIO Joint Negotiating Committee for Phelps Dodge, et al. v. National Labor Relations Board,* the amended opinion

dated May 25, 1972 in connection with which is reported at 459 F.2d 374.[1]

All parties to that case have consented to the filing of this brief, and copies of their letters of consent have been filed herewith.

Background of the Case

The case below arose from negotiations in 1967 and 1968 between Phelps Dodge Copper Corporation ("Phelps Dodge") and various unions representing certain of its employees in its so-called Western Operations. After the unions had first asked for and Phelps Dodge had refused joint bargaining on a company-wide basis, the unions persisted in certain bargaining demands and tactics (including conditioning settlement on simultaneous and satisfactory settlements of contracts in other bargaining units in a refinery and in fabricating plants separate from the Western Operations, and an eight-month strike in support of their demands) which the National Labor Relations Board (the "Board") found to be an unlawful attempt to negotiate beyond the scope of the properly established bargaining unit and a violation of the requirement of Section 8(b)(3) of the National Labor Relations Act (the "Act") that the unions bargain in good faith.

The Court of Appeals set aside the Board's order as not substantiated by the record and as being without a basis in law.

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1. The decision of the Court of Appeals for the Third Circuit may be found at page A-1 of the Appendix to the Petition For a Writ of Certiorari in No. 72-220, this Term.

Kennecott's Interest

Kennecott is a New York corporation. Like Phelps Dodge it carries on copper mining operations in the Western part of the United States. Like Phelps Dodge, Kennecott has a refinery, fabricating plants, and other operations which are not a part of its Western copper properties and the union-represented employees of which are in different bargaining units from those of the Western copper properties. Like Phelps Dodge, Kennecott negotiated in 1967 and 1968 with various unions with regard to certain employees of its Western copper properties. As in the case of Phelps Dodge, the unions sought throughout the negotiations in one way or another to expand the negotiations beyond the scope of the bargaining involving the Western copper properties and ultimately went out on strike for eight months in support of these demands. Like Phelps Dodge, Kennecott filed an unfair labor practice charge with the Board. The Board's Trial Examiner found the unions' conduct to have been an attempt to force Kennecott to bargain beyond the scope of the Western copper properties and to have violated Section 8(b)(3) of the Act. The unions took no exceptions to the Trial Examiner's decision, and that decision thus automatically became the decision of the Board. No litigation occurred in the Court of Appeals and the Board's order is outstanding against the unions.

While the Board's order in Kennecott's case is outstanding and while there are factual differences between this case and Kennecott's case which Kennecott believes make it unlikely that the order in Kennecott's case would be denied enforcement because of whatever may be the outcome

of this case, Kennecott, as a copper producer and industrial employer which has been shut down on strike for eight months at the same time as Phelps Dodge, has a material interest in this Court's determination of this case.

Reasons for Granting the Petitions

1. Few areas of law directly touch as many people as that of labor relations. The importance of that field is evidenced by the increasing number of such cases which find their way onto the docket of this Court.

If one were to poll the leaders of labor and industry and the labor relations press across the country with regard to what they consider the most important unresolved question in labor relations today, it would not be surprising if leading the list were the questions raised by what some call "coalition bargaining", including how far may unions properly go in forcing the merger of established bargaining units, or, put another way, in coercing an employer or employers to agree to bargain in the negotiations with regard to one established bargaining unit about terms and conditions of employment to be effective in one or more other established bargaining units.

Among the consequences turning on the answer are

—the extent to which the Board will continue to be (as the Board considers that Section 9 of the Act requires it to be) the arbiter of the appropriate unit for collective bargaining purposes;

—the extent to which the union and employees in one activity should be in a position through pressure

on the employer in that activity to impose terms and conditions of employment on another and perhaps quite unrelated activity;

—the extent to which decisions affecting the interests of the union and the employees in one activity should be taken out of the hands of those most closely concerned with the consequences of those decisions;

—the extent to which unions should be in an improved position because of disputes local to one activity to shut down a substantial part of an industry with (as happened in the case of the eight-month strike against Phelps Dodge, Kennecott and others in the copper mining industry in 1967 and 1968) significant loss of domestic production of products vital to domestic industry, loss of domestic employment and adverse impact on the country's balance of payments;[2] and

—the extent to which, through expanded bargaining units within and across industry lines, unions should be in an improved position to discourage wage differences between groups of employees without regard to differences in the other costs of and consumer demand for what they make, and thus to increase domestic inflationary pressures and the likelihood of disappearance of or export of jobs as the costs of particular products become higher than their consumer is willing to pay.

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2. *Joint Statement on Copper Panel Report By Secretaries of Commerce and Labor* (1968), printed as the appendix hereto, and Chernish, *Coalition Bargaining*, p. 200 (1969).

An important federal question calling for the guidance of this Court is at issue.

2. The decision of the Court of Appeals for the Third Circuit is at odds with the decisions of the Courts of Appeals for the Second, Fifth and Sixth Circuits.

The unions in the *Phelps Dodge* case sought expansion of the historical bargaining units and insisted on such expansion despite its rejection by Phelps Dodge. The unions' doing so was as much a violation of Section 8(b)(3) of the Act as in *Douds v. International Longshoremen's Association*, 241 F.2d 278 (2d Cir., 1957) the respondent union violated Section 8(b)(3) when it "insisted that the Association 'bargain with them for all employees engaged in longshore work in all ports from Portland, Maine to Brownsville, Texas' after the National Labor Relations Board had decided that the appropriate unit for bargaining was the Port of Greater New York and vicinity" (at 241 F.2d 281).

> ". . . The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining. That question is for the Board to decide on a petition under Section 9(c) of the Act, and its decision is conclusive on the parties. . . . although the decision may subsequently be changed.
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> "The process of change not permitted by the Act is one that denies the Board this ultimate control of the bargaining unit and disrupts the bargaining process itself. This is precisely what occurs when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of

> the other demands a change in that unit. Such a demand interferes with the required bargaining 'with respect to rates of pay, wages, hours and conditions of employment' in a manner excluded by the Act. It is thus a refusal to bargain in good faith within the meaning of Section 8(b)(3)." (At 241 F.2d 282, 283.)

In *Standard Oil Company v. National Labor Relations Board*, 322 F.2d 40 (6th Cir., 1963), agreement regarding the unit at hand was reached orally and then the respondent unions announced that they would not end their strike until agreement was reached in still other bargaining units. The unions' conduct was held to have violated Section 8(b)(3) of the Act. Whether it is early (as in the *Phelps Dodge* case) or late (as in the *Standard Oil* case) in the negotiations that a union takes the position that it will not settle in the bargaining unit at hand until settlements are reached in still other bargaining units, the end result is the same—the collective bargaining which the Act is designed to encourage slams to a halt. In the one case the union reaches the point of signing and then balks until agreements are reached in other bargaining units. In the other the union anticipates that by announcing at some earlier stage that there can be no settlement at all until settlement is reached in still other bargaining units. In either event there is a refusal to bargain with an open mind with regard to the terms and conditions of employment to be applicable in the bargaining unit immediately at hand. If anything, the offense of the union which (as in the *Phelps Dodge* case) takes this adamant position at an early stage in the bargaining is the more aggravated, since bargaining is stalemated that much earlier in the game.

In *National Labor Relations Board v. South Atlantic and Gulf Coast District International Longshoremen's Association*, 443 F.2d 218 (5th Cir. 1971) the Court of Appeals for the Fifth Circuit was presented with a situation similar to that in the *Standard Oil* case. The case arose from a labor dispute in the ports of Texas in the fall and spring of 1968-69. After a long strike, the longshoremen reached an agreement on all contract issues; but they refused to execute the agreement until agreement had been reached between the employers and another unit of employees consisting of clerks and checkers. Although the longshoremen did not attempt directly to bargain about the terms of the other contract, the Board found their refusal to execute their own agreement until agreement had been reached in another unit to be a violation of Section 8(b)(3) of the Act, and the Court of Appeals for the Fifth Circuit ordered enforcement of its order.

The Court's attention is also called to *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 266 F.2d 349 (5th Cir., 1959).

Kennecott's case is a classic example of the complete frustration of collective bargaining which results from this technique. In the negotiations for Kennecott's Western properties, the unions insisted upon talking about terms and conditions to be applicable to, for example, a lead and zinc producing unit different from the Western copper properties, and insisted that there could be no settlement with regard to the Western copper properties until there was a settlement with regard to the lead and zinc bargaining unit. Meanwhile in the charade bargaining going on at the lead and zinc property, the unions insisted that there

be no settlement with regard to the lead and zinc bargaining unit until they achieved the terms and conditions ultimately agreed upon in the Western copper properties. Thus the Western copper properties could reach no settlement until there was a settlement with regard to the lead and zinc bargaining unit, while at the same time no settlement could be reached with regard to the lead and zinc bargaining unit until a settlement was made for the Western copper properties. A settlement with respect to each was dependent upon a settlement with respect to the other, and as a consequence collective bargaining was effectively stalemated with regard to both.

The Court of Appeals for the Third Circuit has failed to disapprove the demands and tactics condemned by the Court of Appeals for the Second, Fifth and Sixth Circuits. Review by this Court is in order.

3. The decision of the Court of Appeals for the Third Circuit is also in conflict with observations by this Court.

This Court has made clear that insistence to an impasse on a non-mandatory subject of bargaining is a violation of the Act's good faith bargaining requirements. *National Labor Relations Board v. Borg-Warner*, 356 U.S. 342 (1958). In finding that the unions' conduct in the *Phelps Dodge* case did not violate these requirements, the Court of Appeals for the Third Circuit acted in conflict with this Court's observations in *United Mine Workers of America v. Pennington et al.*, 381 U.S. 657 (1965). There this Court spoke of the duty to bargain as a "duty to bargain unit by unit" and said that "the union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the indi-

vidual circumstances might warrant" (at 666). While the Sherman Act rather than Section 8(b)(3) of the National Labor Relations Act was there at issue, nothing in this Court's opinion suggests that there should be any difference in their construction in this respect.

Conclusion

For the foregoing reasons it is requested that a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be issued.

August 30, 1972

Respectfully submitted,

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APPENDIX

Joint Statement on Copper Panel Report by Secretaries of Commerce and Labor

(Issued February 17, 1968)

We received today the report of the special three-member panel in the prolonged copper strike. We regret that the panel had to report to us that the parties have been unable to reach agreement. However, we appreciate the dedication with which the panel worked on this matter and share their view that a basis does exist for a prompt resolution of the dispute.

The public hearings and private meetings the panel conducted with the companies and unions brought out clearly that the issue of "company-wide bargaining" is blocking a settlement.

We agree with this distinguished panel that the only way to reach a fair and speedy solution to this dispute is for the parties to discard their rigid preconditions for settlement and to begin bargaining immediately on the basis of the panel's suggestions.

The panel stated that bargaining should concentrate on the economic issues but should also include discussion of uniform expiration dates and equality of treatment within these three categories:

(1) Copper mining, smelting and refining; (2) units producing other non-ferrous metals and (3) copper wire and cable and brass fabrication.

We feel the guidelines suggested by the panel members (Professor George W. Taylor, the Rt. Rev. Msgr. George

G. Higgins and George E. Reedy) provide a sound basis for ending this dispute which is causing severe economic hardship to the parties involved and to a number of areas of the country and is having a serious, adverse impact on our Nation's balance of payments position. We strongly urge the parties to resume bargaining immediately within the framework of these suggestions. The national interest requires a prompt settlement of this dispute.